

No. 76-310

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In the Supreme Court of the United States

OCTOBER TERM, 1976

**PACIFIC GAS TRANSMISSION COMPANY,
ET AL., PETITIONERS**

v.

FEDERAL POWER COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE FEDERAL POWER COMMISSION
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 536 F. 2d 393. The court's order denying a joint petition for rehearing (Pet. App. B) is not officially reported. The orders of the Federal Power Commission (Commission) (Pet. Apps. D and E) are reported at 52 FPC 620 and 52 FPC 1188, respectively. The Initial Decision of the administrative law judge (Pet. App. C) is reported at 52 FPC 622. The Commission's order issued December 11, 1974, which clarifies the order set out in Appendix E to the petition, is attached hereto as Appendix A. An erratum to that clarifying order is attached hereto as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1976. A joint motion to enlarge the time for filing a joint petition for rehearing was granted on June 2, 1976, and the petition for rehearing was denied on that date (Pet. App. B). The petition for a writ of certiorari was filed on August 31, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTES INVOLVED

Sections 3 and 5 of the Natural Gas Act, 52 Stat. 822 and 823, as amended, 15 U.S.C. 717b and 717d, are set forth as Appendices F and G to the petition. Section 4 of the Act, 52 Stat. 822, as amended, 15 U.S.C. 717c, is set forth in full as Appendix C hereto.

QUESTION PRESENTED

Whether the Commission has authority under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), to amend Pacific Gas Transmission Company's (PGT) previously approved tariff to require PGT to file notices of rate increases pursuant to Section 4 of the Act, 15 U.S.C. 717c.

STATEMENT

Pacific Gas Transmission Company is a pipeline company that transports natural gas from Canada for delivery to its parent company, Pacific Gas and Electric Company (PG and E), in California (Pet. App. A2).

In 1960 the Commission granted PGT a pipeline certificate and import license for the importation of Canadian gas. At the same time the Commission approved a "cost of service tariff" for PGT. A cost of service tariff is an exception to the normal form of tariff prescribed by the rules which the Commission has promulgated under

Section 4 of the Natural Gas Act, 15 U.S.C. 717(c). See 18 C.F.R. Part 154. A cost of service tariff permits a company to charge on the basis of its costs and to change its rates according to changes in its costs without having to file a new tariff for each change in the rate as required by Section 4.¹ In approving the tariff in 1960, the Commission acknowledged its hearing examiner's concern that the price of Canadian gas (an element of PGT's cost) might not be adequately regulated, but concluded on the basis of the circumstances at that time that the prospect of stability in Canadian prices was sufficiently good to warrant approval of the tariff. *Pacific Gas Transmission Company*, 24 FPC 134, 136-138.

In 1973, the Commission instituted an investigation under Section 5 of the Act "to determine whether PGT's cost of service tariff should be modified to limit or redefine the costs which may be reflected in PGT's rates as purchased gas costs" (Pet. App. C17).² In the course of the proceeding, the Commission became aware that Canadian regulatory

¹Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), requires companies to file changes in their rates thirty days before the changes go into effect, "[u]nless the Commission otherwise orders."

Under the Commission's regulations, with certain stated exceptions, rate schedules filed with the Commission are required to state the rate in cents or dollars and cents per unit, 18 C.F.R. 154.38 (d). A cost of service tariff is an exception which the Commission may permit under 18 C.F.R. 154.52.

Prior to the Commission's action here, PGT enjoyed the unique status of being the only importer of Canadian gas to have been granted a cost of service tariff. All other such importers have long been required to do what PGT is now required to do: file a notice of increased rates pursuant to Section 4.

²The proceeding was instituted as a result of PGT's having filed an amendment to its gas purchase contract with its Canadian supplier. The amendment never became effective and the issues with respect to it are not pertinent to this proceeding.

authorities were planning to increase significantly the export price of Canadian gas. In particular, the export price was scheduled to be increased from 38 cents to 70 cents per Mcf on July 1, 1974, with still further increases to be anticipated. After an evidentiary hearing, the Commission's administrative law judge ordered that PGT's tariff be amended to require that PGT obtain prior Commission approval of increases in its rates reflecting increases in the cost of Canadian gas (Pet. App. C33). The administrative law judge noted that PGT's cost of service tariff had been originally authorized "with the expectation that the prices of Canadian gas would be relatively stable, that increases would be moderate and that these would be cost based" (Pet. App. C28). He concluded that PGT's cost of service tariff seriously restricted the Commission's ability to deal with a radically changed situation and should therefore be modified.

The Commission originally adopted the administrative law judge's decision (Pet. App. D). On rehearing the Commission modified its order to eliminate the requirement of advance Commission approval of price increases and to require only that PGT file notices of price increases pursuant to Section 4 of the Act (Pet. App. E). Section 4 authorizes the Commission to review and temporarily suspend such increases and to order refund of those increases found to be unlawful.

On review, the court of appeals, one judge dissenting, affirmed the Commission's order (Pet. App. A). The court held that the modification of PGT's cost of service tariff was clearly within the power of the Commission under Section 5(a) of the Act. After noting the increases in the price of Canadian gas, the court stated (Pet. App. A7-A8):

In light of newly developed situations these changes made the tariff "unreasonable insofar as it deprived the Commission of authority to decide in

advance whether PGT should be permitted to reflect certain types of increased costs in its charges." In short, while the Commission did not find a specific rate unjust or unreasonable or discriminatory, it did find, as it was obliged to do under the existing facts, that the existing tariff so directly controlled the going rate for purchased gas as to render it unjust and unreasonable in that it permitted any new rate fixed for purchased gas by the Canadian authorities to be passed on automatically to P, G and E and thence to the two million customers of P, G and E in California. Such a practice, if permitted to continue, would be an abdication of the Commission's statutory duty, making it a rubber stamp for Canadian authority, and inevitably subjecting gas consumers to unjust and unreasonable rates fixed by the Canadian authority ipse dixit.

Since the Commission's order was issued the export price of Canadian gas was further increased to \$1.00 per Mcf on January 1, 1975, to \$1.40 per Mcf on August 1, 1975, to \$1.60 on November 1, 1975, and to \$1.80 on September 10, 1976. PGT has filed notices of increased rates reflecting each of the foregoing increases, and those increased rates have been permitted to become effective without suspension or refund liability.³

³PGT's request to include in its rates an increase to be effective on January 1, 1977, was denied without prejudice to PGT's right to re-file for the increase pursuant to Section 4 of the Act and its amended tariff. On November 2, 1976, in FPC Docket No. RP77-9, PGT filed a notice of increased rate, pursuant to Section 4, to track the January 1, 1977, rate increase imposed by the Canadian authorities.

ARGUMENT

The Commission's orders were within its statutory authority and were supported by substantial evidence and reasons. They present no issue meriting review by this Court.

The Commission correctly found that PGT's cost of service tariff, which permitted PGT to increase rates without notifying the Commission beforehand, was unreasonable in view of the radically changed circumstances concerning the price of Canadian gas. PGT's cost of service tariff was originally approved on the assumption, no longer valid, that Canadian prices would be relatively stable. Indeed, as the court of appeals recognized, the Commission would have abdicated its statutory responsibility if it had permitted PGT to continue to increase its rates automatically and without providing the Commission a meaningful opportunity to review the increases. Under the changed circumstances, it was entirely reasonable for the Commission to require PGT to do what all other pipeline importers of Canadian gas are required to do—to file notices of increased rates under Section 4.

There is no merit in petitioners' contentions that the Commission's action threatens to bankrupt PGT or otherwise prejudices the natural gas industry. The Commission has not suspended any tariff, ordered any refund or otherwise denied the recovery of any costs incurred by PGT. Far from having "sent shock waves through the natural gas industry" (Pet. 16), the Commission has merely put PGT on the same footing as other importers by ensuring that henceforth the Commission will be able to exercise its statutory authority under Section 4 to review rate increases and thus to protect the interests of the ultimate consumers of gas.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DREXEL D. JOURNEY,
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NOVEMBER 1976.

APPENDIX A

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush
Moody, Jr., and Don S. Smith.

Pacific Gas Transmission Company) Docket No. RP73-111

ORDER CLARIFYING PRIOR ORDER

(Issued December 11, 1974)

On November 1, 1974, the Commission issued an order in this proceeding modifying its order of September 3, 1974, and otherwise denying applications for rehearing of the order of September 3. That order adopted the initial decision of Administrative Law Judge Israel Convisser dated July 1, 1974, which directed PGT to revise its present cost-of-service tariff to preclude any recovery of increase in the cost of gas purchased from its Canadian supplier unless prior approval is obtained from the Commission.

On November 13, 1974, a letter was received by the Secretary of the Commission from Pacific Gas Transmission Company suggesting a change in language to clarify the ordering clause of the November 1 order. The manifest intention of the order will not be altered by the proposed change. The letter will be treated as a motion for clarification, and such motion is granted.

The Commission orders:

(A) The motion of Pacific Gas Transmission Company for clarification of the order of November 1, 1974, in this proceeding is granted.

(B) Ordering paragraph (A) of the order of November 1, 1974, is amended to read:

"Ordering paragraph 1. of the initial decision herein, adopted as the opinion and order of the Commission by Commission order issued September 3, 1974, is modified to read as follows:

'PGT's tariff be amended by adding, at the end of paragraph 3.1(1) of Rate Schedule PL-1, the following sentence: Provided that prior filings must be made with the Federal Power Commission pursuant to Section 4 of the Natural Gas Act before there is reflected in Seller's cost of service changes any increase in its cost of gas purchased from its Canadian authorities or that reflects a price for purchased gas higher than the price theretofore reflected in the Canadian supplier's price; the increase in Seller's cost of service charges shall be subject to suspension by the Commission pursuant to said Section 4, and, if so suspended, shall thereafter be collected subject to refund as provided in said Section 4.' "

By the Commission.

(S E A L)

Mary B. Kidd,
Acting Secretary.

APPENDIX B

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Pacific Gas Transmission Company) Docket No. RP73-111

ERRATUM NOTICE (August 12, 1975)

ORDER CLARIFYING PRIOR ORDER (Issued December 11, 1974)

Page 2, Ordering paragraph 1. of initial decision, as modified is changed to read: (Change underlined)

PGT's tariff be amended by adding, at the end of paragraph 3.1(1) of Rate Schedule PL-1, the following sentence: Provided that prior filings must be made with the Federal Power Commission pursuant to Section 4 of the Natural Gas Act before there is reflected in Seller's cost of service *charges* any increase in its cost of gas purchased from its Canadian *supplier either that is imposed or required by Canadian* authorities or that reflects a price for purchased gas higher than the price theretofore reflected in the Canadian supplier's price; the increase in Seller's cost of service charges shall be subject to suspension by the Commission pursuant to said Section 4, and, if so suspended, shall thereafter be collected subject to refund as provided in said Section 4.

Kenneth F. Plumb,
Secretary.

APPENDIX C

Section 4 of the Natural Gas Act, 52 Stat. 822, as amended, 15 U.S.C. 717c, provides:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective.

If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.